United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 948

Case No. 1049: ZHU

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 28 June 1998, Weiyi Zhu, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 October 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"**PLEAS**

A. Preliminary Measures

The Applicant respectfully requests this Tribunal to order the Respondent to produce the following documents:

1. The two assessments concerning the Applicant's performance as verbatim reporter for the General Assembly of the United Nations in 1987 and 1988.
2. The letter jointly submitted to a former UN Secretary-General by 31 colleagues of [the Chief of the Chinese Unit].

The Applicant applies for oral proceedings and respectfully requests this Tribunal to hear the following witnesses:

...

B. The Contested decisions

1. One-year extension of a two (2) year fixed-term contract;
2. Withholding the promotion to P-3.

C. Compensations:

1. Reinstatement at P-3 level on fixed-term contract;
2. US $ 100,000 for damages caused by
   a. the contested decisions;
   b. the discrimination against the Applicant, and persistent wrongful obstruction of the Applicant's appeals;
3. Legal fees and ... costs in the amount of US $ 110,000."

Whereas the Respondent filed his answer on 22 February 2000;

Whereas the Applicant filed written observations on 12 April 2000;

Whereas, on 18 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 23 February 1990, as an Associate Translator. He was offered a two-year fixed-term appointment at the P-2 level. His letter of appointment specified under Section 5, "Special conditions" that he was on "secondment from [the] Chinese Government". In accordance with the Agreement between the United Nations and the United Nations Industrial Development Organization (UNIDO) for the Transfer, Secondment and Loan of Staff of 1985, the Applicant was assigned to the UNIDO Department of External Relations, Public Information, Languages and Documentation Services (EPL), in Vienna, keeping his United Nations contractual status. On 24 August 1992, the Applicant separated from service.

In September 1991, the Applicant's supervisor, (the Chief of the Chinese Unit) submitted his performance appraisal report for the period 23 February 1990 to 22 February 1991. According to the supervisor, the Applicant had "Partly achieved the expected results".

On 7 October 1991, the Applicant and a colleague addressed a memorandum to the Head, Translation Section, the Director, Languages and Documents Division (LD) and the Deputy Director-General, EPL, complaining that their supervisor "out of his personal prejudice", had scaled down their performance rate, contrary to UNIDO's standards and procedures. According to the two staff members, the supervisor's explanation was that with the salary reduction practice coming to an end (as of March 1991, Chinese Translators were allowed to keep their full salaries), the criteria applied to them should be higher than those applied to their predecessors and that he did so because he was under "external pressure". Subsequently, the Applicant's rating was changed to "Fully achieved the expected results".

On 30 January 1992, the Director, LD, met with the Applicant, in the presence of the Head, Translation Section. He advised the Applicant, *inter alia*, to improve his performance, to change his attitude and to be more receptive to the professional recommendations of his colleagues. On 31 January 1992, the Director, LD, wrote to the Applicant to inform him that, in view of his positive reaction to their conversation, he recommended to award his salary increment.

On 12 February 1992, the Chief, Personnel Administration Section, UNIDO, wrote a memorandum to the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), referring to an earlier report of the UNIDO joint working group for the review of the contractual status of staff members of the Languages and Documentation Division on secondment. The working group, even though stating that the Applicant had "fully achieved expected results", felt that he needed to make more efforts to learn from the revisers comments and recommended a "one-year extension of fixed-term appointment".

Following OHRM's approval, the Applicant was offered and accepted a one-year appointment effective 23 February 1992. The letter of appointment stated he was no longer considered on secondment from the Chinese Government.

On 5 August 1992, the Applicant wrote to the Director of Personnel, UNIDO, stating that he "offered to resign from UNIDO and thereby from UN for various reasons". The Applicant wrote another letter of resignation addressed to both the Secretary-General and the Director-General, UNIDO, on 6 August 1992, stating that his resignation would be "effective as of 24 August 1992". On 7 August 1992, a UNIDO Personnel Officer replied to the Applicant,

waiving the official one-month notice period and accepting the resignation as of 24 August. On 12 August 1992, the UNIDO Personnel Officer advised OHRM by facsimile of the above.

On 9 March 1993, the UNIDO Personnel Officer forwarded to the Applicant the performance appraisal report covering his service for the period 23 February 1991 to 24 August 1992.

On 24 March 1993, the Applicant replied to the UNIDO Personnel Officer pointing out that, since his service during the covered period was "fully successful", his supervisor was not "justified or excused" in withholding the recommendation for his promotion to P-3. He asked that he be given a "retroactive promotion along with the raised pays".

On 27 May 1993, the Applicant wrote to the Deputy Directors-General of the Departments of Administration and EPL, requesting to be re-employed, alleging that he "was pushed to resignation" by the actions of his supervisor. On 24 June 1993, the Director, Personnel Services Division, UNIDO, replied to the Applicant that, due to severe budgetary constraints, UNIDO was forced to apply strict policies leading to staff reduction, preventing, for the time being, any regular recruitment.

On 29 August 1993, the Applicant lodged a complaint with the UNIDO Joint Appeals Board (UNIDO JAB). The UNIDO JAB submitted its report on 30 March 1995. Having declared itself competent, it rejected the appeal, concluding that "the appealed decision was not unlawful and was not invalidated by a number of irregularities brought forward by the Appellant". On 25 April 1995, the Director-General, UNIDO, endorsed the conclusions of the UNIDO JAB.

On 10 June 1995, the Applicant filed a complaint with the Administrative Tribunal of the International Labour Organisation (ILOAT). In its Judgment 1059 of 11 July 1996, the ILOAT declared itself incompetent to entertain the claim.

On 22 December 1996, the Applicant filed an appeal with the Vienna JAB. The JAB issued its report on 11 May 1998. Its observations, conclusions and recommendation read as follows:

"*Observations and Conclusions*

18. The Panel noted that the decision to grant the Appellant a one-year extension of his fixed term appointment at the P-2 level, thereby withholding his promotion to the P-3 level, did not violate the Appellant's letter of appointment ...

...

20. ... After examining the materials before it, the Panel was unable to find any evidence of prejudice or any other extraneous factor on the part of the Respondent or on the part of the working group ... on whose recommendations the Respondent based the impugned decisions.

21. As regards the Appellant's claim for reinstatement or re-employment at the P-3 level, the Panel noted that there is no right to reinstatement [staff rule 103 (a)], and that the said claim resulted from the resignation of the Appellant, which is a separation initiated by the Appellant. The Panel recognised that there might have been difficulties in the Chinese Translation Unit during the Appellant's service, it noted with concern that the Appellant's first and second performance appraisal reports ... were submitted late, but that all things considered, the Appellant has not demonstrated that he had no opportunity to address his grievances through the internal procedures, such as rebuttal of his performance appraisal; or that conditions under which he worked were so egregious so as to make his resignation involuntary. Moreover the Appellant's immediate supervisor ... was replaced by another supervisor, two months before the Appellant's resignation. The Panel thus concluded that the Appellant has failed to prove that his resignation was involuntary. As regards the claim for re-employment, it noted further that there is no reason why the Appellant could not apply for vacancies within the Secretariat, and that he would no doubt, be given an equal opportunity like other applicants.

Recommendation

22. In light of the foregoing observations and conclusions, the Panel could not recommend the granting of the relief sought by the Appellant."

On 5 June 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has ... taken note of the [JAB's] findings that, in regard to the one year extension of your fixed-term appointment, the terms of your

> appointment were not violated, proper procedures were followed, and there was no evidence of prejudice or any other extraneous factor. In respect of your claim for reinstatement or re-employment at the P-3 level, the Secretary-General has taken note of the [JAB's] finding that your separation was initiated by your resignation, that you had failed to prove that your resignation was involuntary, and that you had no right to reinstatement ... The Secretary-General has further noted that the [JAB] did not recommend the granting of the relief you requested, and, accordingly, he has decided to take no further actions in your case".

On 29 October 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance appraisal report indicates he "fully achieved the expected results" and therefore he was entitled to a two-year extension of his contract and promotion to the P-3 level. The decision to grant him only a one-year extension and to deny him a promotion violated his rights.

2. The Applicant claims that his resignation was coerced. He was forced to work under very difficult circumstances because his immediate supervisor treated him unfairly and discriminated against him.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to or expectancy of a promotion. The decision to extend the Applicant's appointment for one year only and not to promote him was a proper exercise of the Secretary-General's discretionary authority and was not vitiated by prejudice or other extraneous factors.

2. The Applicant has not produced any evidence substantiating his claim that he was coerced to resign from service.

The Tribunal, having deliberated from 13 to 28 July 2000, now pronounces the following judgement:

I. The Applicant appeals the decision of 5 June 1998, in which the Respondent accepted the JAB's recommendation against granting the Applicant the relief he requested. The Applicant claims that under his fixed-term appointment he had a "legal expectancy" of renewal. He also claims that he was entitled to a two-year extension of his appointment and promotion to the P-3 level and that this was denied solely because his supervisor was prejudiced against him.

II. Insofar as the case concerns the legal expectancy involved in the renewal of fixed-term appointments, the Tribunal affirms the recommendation of the JAB, and the Respondent's acceptance of this recommendation.

As a fixed-term employee, the Applicant's expectations were squarely governed by staff rule 104.12 (b) (ii) which stipulates:

> "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

The Tribunal has consistently held that employment with the Organization ceases on the expiration date of fixed-term appointments and that a legal expectancy of renewal is not created by efficient or even by outstanding performance. (Cf. Judgements No. 719, *Kartsev* (1995); No. 726, *Hamza* (1995); No. 795, *El-Sharkawi* (1996); and No. 907, *Salvia* (1998)).

Additionally, the Applicant has produced no evidence of expectancy based on formal or informal promises made to him, which might be grounds for a "legal expectancy" based in estoppel.

III. The Applicant based his argument that he was entitled to promotion to the P-3 level on his claims that his performance was rated fully successful and he maintains that the denial was a result of prejudice against him. However, the Applicant's performance records are in fact mixed. They show improvement over time, but were not unblemished overall. In any event, promotion is strictly at the discretion of the Secretary-General.

As a translator, any promotion to which the Applicant may have been entitled was governed by rules particular to translators, i.e., UN Personnel Directive PD/9/59 of 4 March

1959, "*Policy for the recruitment and promotion of translators and translator-précis-writer trainees*".

According to Section II (c) of PD/9/59, the basis for promotion is discretionary:

> "If upon completion of two years of service, the performance of a staff member originally recruited on a fixed-term appointment cannot be certified as warranting promotion to the P-3 level, the Office of Personnel Service may, without referral to the Committee, grant an extension of appointment - at the P-2 level - for a further period not to exceed one year. If at the end of this period he or she is certified as in (b) above as giving fully satisfactory service, he or she may be offered a new fixed-term appointment at the P-3 level."

This provision shows clearly that promotion is not compulsory but discretionary, as indicated by the word "may".

IV. The second issue raised by the Applicant concerns his resignation and request for reinstatement. It is undisputed that the Applicant offered to resign on 5 August 1992, tendered his formal resignation to the Organization on 6 August 1992, and that his resignation was accepted. The Applicant argues, however, that his resignation was not voluntary. He pointed to extremely poor working conditions under his supervisor and the partial attitude displayed by the supervisor to him as the background reasons for his resignation, calling the working conditions "coercive". There are strong indications in the record that all was not well in the Chinese Translation Unit. However, the Applicant does not explain why he felt the need to resign, even though the supervisor was replaced as head of the office two months prior to his resignation.

The burden of proving that his resignation was coerced was on the Applicant. According to both the UNIDO JAB and the Vienna JAB, the Applicant did not produce any convincing evidence to substantiate his claim that he was coerced to resign from service. Similarly the Tribunal finds that he evidence on record fails to prove that his resignation was coerced. Thus, the Tribunal concludes that the Applicant's resignation was voluntary. As such the Applicant is not entitled to reinstatement.

V. The Tribunal recognizes that there were difficulties in the Chinese Translation Unit during the Applicant's period of service, which were detrimental to him. In addition, the

Tribunal notes with concern that there were substantial delays in the preparation of the Applicant's first and second appraisal reports, preventing him from submitting timely rebuttals. Accordingly, the Tribunal awards the Applicant compensation.

VI. In view of the foregoing:

(a) The Tribunal order the Respondent to pay to the Applicant three months net base salary at the rate in effect at the time of his separation from service, as compensation;

(b) All other pleas are rejected.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary